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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-371

DAVID RANDLE CORDLE,
Petitioner,

vs.

THE STATE OF ALABAMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA AND THE COURT OF CRIMINAL APPEALS OF ALABAMA

Frank W. Riggs
Counsel for Petitioner
P. O. Box 1047
Montgomery, Alabama
36102

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OF ALABAMA

This is a Petition to review the decisions of the Supreme Court of Alabama and the Court of Criminal Appeal of Alabama for denying the Petitioner, David Randle Cordle a free copy of his preliminary hearing transcript and for affirming the decision of the Circuit Court of Montgomery.

OPINIONS BELOW

The original decision in this case was rendered by the Circuit Court of Montgomery County, Alabama, Fifteenth Judicial Circuit. The Court of Criminal Appeals of Alabama affirmed the decision of the Circuit Court of Montgomery County. The Supreme Court of Alabama denied Petitioner's petition for Writ of Certiorari. Applications for rehearing were also denied by the respective courts.

It is anticipated that the opinion rendered by the Court of Criminal Appeals of Alabama will be reported in Alabama Appellate Reports and in Southern Reporter, Second Series.

JURISDICTION

The decisions of the Alabama Court of Criminal Appeals and Supreme Court of Alabama, to which Petitioner requests Writ of Certiorari, were rendered on the 9th day of April, 1974, and on the 20th day of June, 1974, respectively. Application for rehearing in the Alabama Court of Criminal Appeals was denied on the 21st day of May, 1974, and denied by the Supreme Court of Alabama on the 8th day of July, 1974.

The jurisdiction of this Court is invoked pursuant to Supreme Court Rule, Part V. Jurisdiction in Writ of

Certiorari, 19 (1) (a):

> Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

QUESTION PRESENTED

Do the due process and equal protection clauses of the Constitution of the United States require that an indigent defendant be provided a free transcript of a preliminary hearing on a charge of rape where testimony is given at that hearing by the alleged victim of the rape, who is the only witness who says that a crime was committed by the defendant?

STATUTES INVOLVED

Title 15, Sec. 135, Code of Alabama (Recomp. 1958):

> The evidence of the witnesses examined, both for the state and for the defendant, must be reduced to writing by the magistrate, or under his direction, and signed by the witnesses respectively.

(This statute was repealed after this Court's decision in Roberts v. LaVallee, 389 U.S. 40, 88 S.Ct. 194, 19 L.Ed.2d 41 (1967), by Act No. 1106, General Acts of Alabama, 1969, approved September 12, 1969.)

STATEMENT OF THE CASE

At approximately 8:00 o'clock p.m. on November 24, 1971, Glenda Lee Bolen left her apartment, where she lived with her mother and brother, and traveled to the home of Capt. and Mrs. Robert Geil for the purpose of babysitting the Geil's two small children (R. 40). About 9:00 o'clock p.m., on the same evening, Glenda helped the two children into their beds and commenced reading a magazine and watching television (R. 41). Sometime shortly thereafter, a male person entered the Geil's apartment, approached Glenda from her backside, placed his arms and hands around her head and demanded that she quietly walk out of the apartment (R. 42). Once outside of the apartment, the male person ordered Glenda to get in an unidentified parked automobile and to keep her head on the seat without any unnecessary movement. Glenda was subsequently driven to a dirt road where she was raped and thereafter returned to the apartment complex from which she had previously been taken (R. 43-47).

Petitioner, David Randle Cordle, was initially questioned by police officers from the Montgomery Police Department on the afternoon of December 27, 1971, at his place of employment in Wetumpka, Alabama (R. 55). After answering inquiries concerning an incident which occurred on December 24, 1971, Randy was transported to Montgomery Police Headquarters where interrogation of various incidents, including the rape of Glenda Bolen mentioned hereinbefore, continued (R. 56-57). After four (4) hours of rigorous, nonstop interrogation (R. 60), Randy was compelled to sign a "waiver of rights form" (R. 64) and allegedly confessed to a series of different crimes, including the rape of Glenda Bolen. Notwithstanding the fact that Randy allegedly made the confessions however, he was not actually placed under arrest until the next day, December 28, 1971 (R. 65).

A preliminary hearing was held on January 12, 1972, at which time, appointed defense counsel, William P. Haney, Jr., made a timely request that the accused be provided with a free transcript, or a reasonable substitute, of all pertinent testimony given therein (R. 3). The request for a free copy of the preliminary hearing transcript was made due to Randy's financial inability to pay for a court reporter and the critical importance of having a permanent record of the preliminary hearing for the purpose of "freezing" testimony, discovery and

impeachment. Randy's request for a copy of the preliminary hearing transcript was denied.

During the preliminary hearing, Glenda Lee Bolen, the only eyewitness to the alleged crime, testified, and with no record of her testimony, Randy was bound over to the grand jury of Montgomery County and subsequently indicted for rape. The grand jury indictment was returned on February 17, 1972.

Prior to arraignment, Randy's appointed defense counsel moved the Circuit Court of Montgomery County to quash the grand jury indictment on the grounds that the presiding judge at the preliminary hearing refused to provide the accused with a copy of the preliminary hearing transcript. Appointed counsel further moved the Court to grant the accused a new preliminary hearing with a court reporter ready and available to make the requested transcript. Counsel also averred in his motion that the Defendant's preliminary hearing involved a series of crimes charged against the Defendant and that the testimony was extensive, lasting several hours and involving several alleged confessions, both written and oral. The Motion to Quash was argued ore tenus befor the Presiding Judge of the Criminal Division of the Circuit Court of Montgomery County, and subsequently denied (R. 3, 4).

Arraignment proceedings were conducted on February 22, 1972, and Randy Cordle pleaded not guilty to the alleged charges (R. 26-30).

On April 13, 1972, Mr. William Haney (having been appointed as an Assistant District Attorney) withdrew as the court appointed attorney in this case, and the Honorable Sam W. Taylor was appointed to represent Randy in Mr. Haney's absence (R. 10). After Mr. Taylor's appointment, the request for a free copy of the preliminary hearing transcript was renewed, but again the request was denied. Present counsel has been employed by relatives of Petitioner since the trial of the case.

On June 6, 1972, Randy was given a jury trial on the charge of rape, with the Honorable Frank Embry, Supernumerary Judge, Fifteenth Judicial Circuit, presiding (R. 12). During the course of trial, defense counsel objected to the introduction of the alleged oral confession, mentioned above, on the grounds that the confession was obtained illegally (R. 70). The objection was overruled and a motion for a mistrial was denied (R. 71). Counsel for the defense, also objected to the introduction of a written confession and moved for a mistrial (R. 73). But again, both the objection and the motion for a new trial were denied (R. 73).

During the trial, counsel for the Defendant called Dr. Wallace Sidney Marshall, a prominent psychiatrist, to testify that Randy was unable to distinguish between right and wrong at the time of the commission of this particular crime. Dr. Marshall testified that his diagnosis of Randy Cordle was one of schizophrenia with paranoid tendencies (R. 110-117). The defense also introduced a report from Bryce Hospital, a state supported mental institution, in reference to the accused's legal sanity (R. 107). Dr. Marshall was requested to give his expert opinion as to the specific medical conclusion set forth in the medical report, viz., whether or not the accused could distinguish between right and wrong at the time he committed the alleged offense. The District Attorney objected to the admission of such testimony, however, and the objection was sustained (R. 120). Interestingly enough, although the report from Bryce Hospital had previously been admitted into evidence, Dr. Marshall, a competent expert in psychiatry, was not allowed to make comment on the report (R. 121, 122).

At the conclusion of the trial, the jury found Randy guilty of rape and fixed his punishment at ninety-nine (99) years and one (1) day in the state penitentiary (R. 134).

REASONS FOR GRANTING THE WRIT

It is generally understood that a preliminary hearing is not recognized as a criminal prosecution nor a criminal trial, but rather, an integral judicial inquiry to determine whether there is reasonable ground to believe that a crime has been committed and whether there is probable cause to believe the defendant committed the named crime. It is imperative to remember however, that the very existence of the preliminary hearing is a matter of state discreation, inasmuch as the federal constitution makes no provision for such inquiry, Lem Woon v. Oregon, 229 U.S. 586, 33 S.Ct. 783, 57 L.Ed. 1340 (1912). In fact, it is historically recognized that the grand jury may successfully bring an indictment against an individual without the existence or operation of the preliminary hearing, see, 21 Am.Jur.2d, Criminal Law Sec. 442-451 and 22 Corpus Juris Secundum, Criminal Law, Sec. 300 et. seq.

In varying and diverse forms, preliminary hearing statutes currently exist in at least 45 states, plus the Virgin Islands and Puerto Rico, and after a cursory examination of the respective state statutes, it can be readily observed that the purposes and procedures of each statute vary almost as widely as the number of states involved. But regardless of the differing views, it is true that the primary purpose of the preliminary hearing is to relieve the

accused of a potential trial when there exists no merit to the complaint, to eliminate and narrow duplicated charges, to perpetuate testimony, and to provide a forum to establish bail.

In Alabama, statutes concerning the preliminary hearing are found at Tit. 15, Sec. 128 et. seq. Code of Alabama (recomp. 1958) and the following has been written on this particular topic:

> A preliminary hearing or examination is not a trial in its ordinary sense nor is it a final determination of guilt. It is a proceeding whereby an accused is discharged or held to answer, as the facts warrant. It seeks to determine whether there is probable cause for believing that a crime has been committed and whether the accused is probably guilty, in order that he may be informed of the nature of such charge and to allow the state to take the necessary steps to bring him to trial. Such hearing also serves to perpeturate evidence and to keep the necessary witnesses within the control of the state. It also safeguards the accused against groundless and vindictive prosecutions, and avoids for both the accused

> and the state the expense and inconvenience of a public trial. "Criminal Procedure in Alabama" M. Clinton McGee, (University of Alabama Press 1954), p. 41.

Although Alabama's statute differs in varying degrees, from preliminary hearing statutes in other states, it can be stated without equivocation, that Alabama's preliminary hearing is considered a "critical stage" in the criminal process, and because of this construction, the assistance of counsel is required during such proceeding. Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970).

It is fundamental to American jurisprudence that a series of procedural steps in the criminal process, without the protection of substantive guidelines, falls far short of providing justice as the framers of the Constitution intended. Consequently, additional constitutional safeguards are required to vindicate the legal rights of every criminal defendant and provide equal protection and due process for all. The primary safeguard is found in the Fourteenth Amendment which provides that every defendant, regardless his wealth, color or nationality, shall be furnished with virtually the same opportunities in the criminal process, e.g., right to obtain legal advice, and the right, in proper circumstances, to obtain a free transcript of court testimony in

order to successfully perfect an appeal. In the landmark decision of Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891, 55 ALR2d 1055 (1956), this Honorable Court recognized the substantive rights of a criminal accused and specifically spoke to the question of whether or not a state should provide a free transcript of the trial court record, to an indigent defendant, for the purpose of prosecuting an appeal from a lower court conviction. In that opinion the Supreme Court said:

> The constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons; all people charged with crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court.

In Britt v. North Carolina, 404 U.S. 226, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971), the Supreme Court referred to Griffin v. Illinois and said:

> Griffin v. Illinois and its progeny establish the principle that the State must, as a matter of equal protection,

> provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners.

Narrowing the scope of our investigation to the specific issue of whether or not the State can be compelled, in proper circumstances, to provide a free transcript of testimony given at the preliminary hearing, Britt v. North Carolina, supra., sets forth the appropriate test to determine if the indigent defendant merits receipt of such a transcript;

> In prior cases involving an indigent defendant's claim of right to a free transcript, this Court has identified two factors that are relevant to the determination of need: (1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript. (404 U.S.)

In other words, there exist two and possibly three factors which determine the necessity of obtaining a free transcript of the preliminary hearing in advance of trial, and such determination must be

made according to the circumstances of each particular case. First, there must be a timely request, second, the value of the record to the defendant in preparation for trial must be considered, and third, the inability of the accused to pay for a court reporter and lack of satisfactory substitute are evaluated. However, once it is established that the defendant has successfully satisfied each of the above requirements, if a free transcript is not provided, there would unquestionably be a violation of both the spirit and the letter of the due process and equal protections clauses of the Fourteenth Amendment, therefore requiring redress. A close examination of the record will reveal that the Petitioner, Randy Cordle, has unquestionably satisfied the requirements set forth in Britt v. North Carolina, supra. By virtue of his timely and repeated requests for a free copy of the preliminary hearing record, due to the crucial testimony offered during the preliminary hearing, and because of Randy's inability to obtain his own court reporter, coupled with a complete absense of any reasonable substitute for a copy of the transcript, the Petition clearly meets the test mentioned in Britt.

Also speaking directly to this point, mentioned immediately above, Griffin v. Illinois, supra., stated:

> In criminal trials a state can no more discriminate on account of poverty than on account of religion, race, or color; the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and cannot be used as an excuse to deprive a defendant of a fair trial.

The question involving a free preliminary hearing transcript has also been discussed in a number of recent state and federal cases, see e.g., Kansas v. Greene, 214 Kan. 78, 519 P.2d 651, 654 (1974); Hunter v. District Ct. In And For the Twentieth Judicial District, ___ Colo. ___, 519 P.2d 941, 942 (1974); State v. Sanchez, 86 N.M. 68, 519 P.2d 304, 305 (1974); State v. Campell, ___ Iowa ___, 215 N.W.2d 227, 229 (1974); State v. Lewis, ___ Iowa ___, 215 N.W.2d 293, 294 (1974); People v. Carroll, 12 Ill.App.3d 869, 299 N.E.2d 134, 140 (1973); Commonwealth v. Minifield, 225 Pa.Super. 149, 310 A.2d 366, 369 (1973); McHale v. State, ___ Miss. ___ 284 So.2d 42, 44 (1973); Jefferies v. State, ___ Florida ___, 284 So.2d 436, 438 (1973); Lau v. Nichols, 483 F.2d 791, 804 (9th Cir. 1973); United States v. Bamberger, 482 F.2d 166, 168 (9th Cir. 1973); United States v. McMann, 408 F.2d 896, 897 (2nd Cir. 1969).

In the present case, the key witness for the State was fourteen-year-old Glenda Bolen. Her capacity to know and understand the nature of the oath and to realize the importance of telling the truth, unquestionably weigh heavily against her competency to testify as a witness. The importance of this fact is significantly increased after realizing that the State, without Glenda's testimony, at both the preliminary hearing and trial, could not have bound Randy over for trial and induced his subsequent conviction. Therefore, because of the serious nature of the offenses alleged and the testimony given at the respective proceedings, the critical importance of having a copy of the testimony given at each proceeding is very apparent.

In Conley v. Denver, 321 F.Supp. 723 (W.D. Pa. 1970), the U. S. District Court recognized the right of a defendant to have a transcript of the preliminary hearing, saying:

> The second enumerated benefit of counsel's presence, to fashion a vital impeachment tool or to preserve the favorable testimony of one who does not appear at the trial, is a benefit which, as a practical matter, cannot be realized without there being available to counsel at trial a verbatim transcript of the preliminary hearing.

We also call the Court's attention to the opinion of the Supreme Court in Roberts v. LaVallee, 389 U.S. 40, 88 S.Ct. 194, 19 L.Ed.2d 41 (1967). In that case, the Court held that where a witness gives crucial testimony, on behalf of the prosecution at the preliminary hearing, the defendant was entitled to a transcript of that hearing. The Court said: "Differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution."

This Honorable Court has also made a similar statement in Britt v. North Carolina, supra., "While the outer limits of that principle (the role of the "equal protection clause" in aiding the defendant to perfect a defense or an appeal) are not clear, there can be no doubt that the State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal."

A number of other decisions have also recognized the constitutional rights of a defendant, especially when such rights are seemingly predicated upon the size of the defendant's pocketbook. See, e.g., Mayer v. City of Chicago, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971); Williams v. Oklahoma City, 395 U.S. 458, 89 S.Ct. 1818, 23 L.Ed.2d 440 (1969); Long v. District Court of Iowa, 385 U.S. 192, 87 S.Ct. 362, 17 L.Ed.2d 290 (1966);

Draper v. Washington, 372 U.S. 487, 83 S.Ct. 774, 9 L.Ed.2d 899 (1963); Gardner v. California, 393 U.S. 367, 89 S.Ct. 580, 21 L.Ed.2d 601 (1961); Eskridge v. Washington Prison Board, 357 U.S. 214, 78 S.Ct. 1061, 2 L.Ed.2d 1269 (1958).

For the purpose of emphasising the importance of the preliminary hearing and the related question concerning the provision of a free transcript to criminal defendants, the preliminary hearing can be favorably compared with appellate review on the state level. The comparison being successfully accomplished because the individual states are not required to provide either a preliminary hearing or appellate review.

In Griffin v. Illinois, supra., we read the following:

> A state is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all; but where a state does grant appellate review in a criminal case, it cannot discriminate against some convicted defendants on account of their poverty, and the due process and equal protection clauses, at all stages of the proceedings, protect a defendant from invidious discrimination.

Also in Rinaldi v. Yeager, 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed.2d 577, (1962), the Court mentions that states have never been constitutionally compelled to provide avenues of review for criminal convictions, however,

> ...it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.

Finally, in Lau v. Nichols, 483 F.2d 791 (9th Cir. 1973) we find the following:

> ...a person's poverty may not be the basis for denying him the same facilities and aids in combatting criminal charges against him as are enjoyed by those who can pay for such facilities and aids with their own funds. Affirmative state action is required to redress the inequality, and the state's duty to redress is imposed without reference to whether or not it can be said that the state in some way caused the inequality in the first place. The state's duty to take affirmative action does not arise because it can be said that the state is primar-

> ily responsible for making a poor man poor. Rather, the duty arises because the state must put justice within reach of every man if the state chooses to provide a system of criminal justice at all.

Also see Blackledge v. Perry, ___ U.S. ___, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974), and Ross v. Moffitt, ___ U.S. ___, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974).

All of these cases stand for one simple proposition, if a particular state is inclined to provide appellate review, it must do so in a manner which does not discriminate against certain defendants because of their financial stature. This same principle should likewise hold true for State supervised preliminary hearings. If the hearing is provided at all, it should be provided in a manner which does not discriminate and work a hardship against those who cannot financially afford a transcript of their preliminary hearing. All defendants, regardless of financial status should be given the opportunity to make use of the discovery techniques available at and by virtue of the preliminary hearing.

In William v. Jasper, 287 Ala. 237, 250 So.2d 701 (1971), the Supreme Court of Alabama refused to follow Roberts v. LaVallee, supra., distinguishing Williams and Roberts on the grounds that the State of New York has a statute which allows for free transcripts to be provided for indigents. In passing however, the Supreme Court of Alabama also mentioned that the State of Alabama formerly had a statute similar to New York's, Tit. 15 Sec. 135, Ala. Code (recomp. 1958) 1940, but after the decision of Roberts v. LaVallee, the Alabama Legislature saw fit, for reason unknown, to repeal the statute, Act. No. 1106, General Acts of Alabama, 1969, approved September 12, 1969.

At first blush, a single statute being repealed presents no great concern and is soon passed off as being merely harmless. But when the existence or nonexistence of a particular statute has a direct bearing upon the guarded rights of a human being, the repealing of a statute cannot be passed off as merely harmless. Therefore, upon closer examination we find a statute that has been recorded since, at least, the turn of the century and which was suddenly repealed to avoid and/or circumvent the decision of the United States Supreme Court in Roberts v. LaVallee, supra. But the true significance of this action, by the Alabama Legislature, is not completely realized until one analyzes the results of such action. Before the sta-

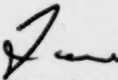
tute was repealed, rich and poor alike were afforded, theoretically, the same opportunity due to the fact that testimony from the preliminary hearing was recorded in each case. Without this statute, however, the opportunity for discrimination is prevalent. The wealthy have the alternative to preserve the testimony from the preliminary hearing, and the indigents, obviously, have no similar opportunity. Needless to say, the United States Constitution cannot tolerate such discrimination, especially when it is initiated under the cloak of legislation.

In conclusion, there exists no stronger argument for the proposition that indigents should be provided with a free transcript of their preliminary hearing than those which exist in this present case. The Defendant requested a transcript prior to the preliminary hearing due to the technical nature of the case and the request was summarily refused. The Defendant was subsequently convicted, and it can be safely stated, that the conviction is more than substantially attributable to the lack of the requested transcript. Therefore, the Circuit Court of Montgomery committed error in denying the Defendants Motion to Quash, the request for a new preliminary hearing and the request for a free copy of the hearing.

For the reasons hereinbefore cited, the Criminal Court of Appeals and the Supreme Court of Alabama also committed error in affirming the decision of the

Circuit Court, therefore the decision of the Courts, mentioned hereinbefore are due to be reversed.

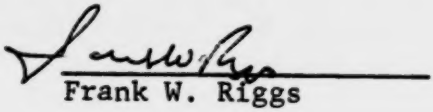
Respectfully submitted,



Frank W. Riggs
Counsel for Petitioner
P. O. Box 1047
Montgomery, Alabama
36102

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Petition for Writ of Certiorari upon Honorable William J. Baxley, Attorney General for the State of Alabama, Administrative Building, Montgomery, Alabama, by mailing copies of same to him, postage paid, this 3rd day of October, 1974.



Frank W. Riggs

APPENDIX

THE STATE OF ALABAMA - JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1973-74

3 Div. 238

David R. Cordle

v.

State

Appeal from Montgomery Circuit Court

HARRIS, JUDGE

Appellant was convicted of rape and the jury fixed his punishment at ninety-nine (99) years and one (1) day in the penitentiary. The judgment and sentence were in accordance with the verdict of the jury. The judgment entry recites that appellant pleaded not guilty, but the record shows that at arraignment in open court his court-appointed counsel interposed two pleas: (1) not guilty and (2) not guilty by reason of insanity. The trial was had on both pleas and the court charged the jury on the law of insanity. After conviction and sentence he gave written notice of appeal. He made known to the court that he was an indigent and

a free transcript was furnished to him. He retained new counsel to represent him on appeal.

Appellant was first arraigned on February 22, 1972, and on February 24, he filed two motions: (1) motion to quash the indictment on the ground that he could not adequately prepare his defense since the preliminary hearing given him on January 12, 1972, had not been taken by a court reporter though he had requested the committing magistrate to obtain the services of a court reporter, and in connection with this motion to quash, he requested a second preliminary hearing with a court reporter, and (2) a motion to send him to a state hospital to determine his sanity at the time of the commission of the offense and his competency to stand trial. Both motions were overruled and denied by the court on February 25, 1972. Nevertheless, on March 10, 1972, the court ordered a psychiatric examination by the staff at Bryce Hospital to determine Appellant's sanity or insanity. On May 1, 1972, the following letter was sent to the Circuit Judge of Montgomery County:

"STATE OF ALABAMA
DEPARTMENT OF MENTAL HEALTH
BRYCE HOSPITAL
Tuscaloosa, Alabama 35401
SEAL
STONEWALL B. STICKNEY, M.D.
COMMISSIONER OF MENTAL HEALTH

"SEAL
GEORGE C. WALLACE
GOVERNOR

"May 1, 1972

"Honorable Richard Emmet
Judge of Circuit Court
Montgomery County, Alabama
Montgomery, Alabama

"Cordle, David R.
Our file 03 28 37

"Dear Judge Emmet:

"David R. Cordle was admitted in Bryce Hospital on March 13, 1972, on your order dated March 10, 1972, and is presently a patient in Bryce Hospital.

"After a period of examination, observation, and study, it is the opinion of the hospital staff that the said David R. Cordle is presently sane and competent. It is our further opinion that he was sane and competent at the time of admission in Bryce.

"We are ready to release him and will hold him awaiting the arrival of the sheriff, or any duly appointed officer, to take him into custody.

"Sincerely,

"s/s Donald Smith
Donald Smith, M.D.
Assistant Superintendant

"pk

"cc: Sheriff Mac Sim Butler
Montgomery County, Alabama
Montgomery, Alabama"

Following receipt of the above letter, the Court ordered the Sheriff of Montgomery County to assume custody of Appellant and to transfer him from Bryce Hospital to the Montgomery County jail to stand trial on the charges pending against him.

A subpoena duces tecum was issued out of the Circuit Court of Montgomery County directed to the records clerk of Bryce Hospital for the production of all medical records pertaining to Appellant's confinement in Bryce Hospital to be used as evidence in his trial. Xerox copies of these medical records properly certified by the assistant superintendent were sent to the Court in response to this subpoena and they were introduced in evidence by Appellant over the objections of the State.

There was no attempt to take the depositions of the Bryce staff appointed to examine Appellant as provided by Title 45, Section 226, Code of Alabama 1940; Sheppard v. State, 49 Ala.App. 398

272 So.2d 605.

The Court could have legally refused to admit in evidence the reports of the doctors who made up the Lunacy Commission for the reason these reports were not made under the sanction of an oath and were not intended for general public information. Benton v. State, 245 Ala. 625, 18 So.2d 428; Benton v. State, 31 Ala.App. 338, 18 So.2d 423.

The facts in this case are sordid in the extreme but it is necessary that we dwell on them to some extent.

Around mid-night on November 24, 1971, Appellant entered the backdoor of an apartment in East Montgomery. The door was closed but was unlocked. He went into the kitchen and stood for a few minutes listening for signs of life in the apartment. From the kitchen he could see into the livingroom. He saw a rocking chair move in the livingroom but could not see the occupant of the chair. He approached the chair from its back and saw a young girl reading a magazine. He reached out and put his hand over her mouth to keep her from screaming. He took her glasses off and put them on a table and while his hand was still over her mouth, he heard a dog bark somewhere in the apartment. He told the girl he had a knife but if she did what he told her to do he would not hurt her. He told her to walk out the backdoor and they walked out side by side with his hand

still over her mouth. He carried her to his car parked on the street near the apartment and put her in the frontseat and told her to keep her head down on the seat. He drove out on the Wares Ferry Road and turned on a dirt road. He told her to take her clothes off and she asked him to please not do anything to her. He slapped her and told her if she didn't take her clothes off, he was going to rip them off. She then proceeded to undress and after she had removed all of her clothes he told her to get in the backseat. She got on the backseat and he got back there with her and started playing with her breasts. She told him she was fourteen years of age and that she was having her period and to please not do anything to her. He ignored her pleas and got on top of her. She felt his privates make contact with her privates. She was a virgin and the first two attempts he made to gain entry were unsuccessful, but he persisted in his efforts. He finally ruptured her hymen and completed the sexual act. After it was over, he handed her clothes to her and told her to dress and he would take her back home. On the return trip he told her to keep her head down on the frontseat. The car stopped for a traffic light and the victim thought they had gotten back to the place where he had forced her into the car and she raised up and got a good look at her assailant for the first time. He drove her a short distance beyond the frontdoor of the apartment where he had

abducted her and he let her out and drove away. She ran into the apartment.

The victim of this rape lived with her mother and brother in the same apartment complex from which she was abducted on the night of the rape but she was baby-sitting for an Air Force captain and his wife in the apartment where Appellant found her. She put a four-year-old child and a small baby to bed about nine o'clock that night and put the dog in the bedroom with the children. This was the dog that barked while Appellant had his hand over the girl's mouth which frightened him and which moved him to take her out on a country road. Between twelve thirty and one p.m., the captain and his wife returned to their apartment and found the baby-sitter's pocketbook and glasses, but the girl was missing. The captain went to the girl's apartment to report her disappearance to her mother. While the captain was talking with the girl's mother, the captain's wife called the girl's mother and told her the girl had returned, but she was in a state of emotional shock, distraught and was highly hysterical and needed her badly. The police were alerted and responded immediately. The mother dressed and went to her daughter. The girl was carried to the emergency room of a local hospital. The doctor on duty was informed that the girl had just been raped and he conducted a vaginal examination

including a pap smear. He found fresh male fecundating fluid or semen.

A few weeks later the victim was shown a number of photographs of suspects at the Montgomery Police Department and she identified Appellant as the man who raped her on the night of November 24, or the early morning hours of November 25, 1971.

On the afternoon of December 27, 1971, three Montgomery police officers went to Wetumpka and found Appellant at work at a cotton gin. They identified themselves and told Appellant they wanted to talk to him about an incident that occurred in Montgomery on December 24, 1971. They asked him if he wanted to talk with them there or in Montgomery and he told them he would rather talk in Montgomery but he wanted to go by his home in Wetumpka first. Appellant got in the police car with two of the officers and they carried him by his home and then brought him to the detective's office at Headquarters. The third officer drove Appellant's car from the cotton gin.

They arrived at Police Headquarters around 4:00 p.m. on December 27, 1971, and the officers immediately gave Appellant the rights and warnings extolled in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.

After the Miranda warnings were given to Appellant, he told the officers that he fully understood his rights and that he was willing to answer questions. He thereupon signed a waiver of rights form as shown below:

"CITY OF MONTGOMERY, ALABAMA
DEPARTMENT OF POLICE

"David Randall Cordle
NAME

"Police H. Q. Det. Office
PLACE

"Dec. 27, 1971
DATE

"8:20 P.M.
TIME

"Rape
CHARGE

"Before asking you any questions, I must explain to you that you can remain silent, that anything you say can be used against you in court, that you can talk to a lawyer first and that you have the right to the advice and presence of a lawyer even though you cannot afford to hire one. If you cannot afford to hire a lawyer and want to have one present during the interrogation, the Court will

appoint one before we question you. If you want to answer questions now, you can do so, but you can stop answering at any time.

"s/s H. W. Gandy
OFFICER

"I fully understand the foregoing statement and do willingly agree to answer questions. I understand and know what I am doing. No promise or threats have been made to me by anyone and no pressure of any kind has been made against me by anyone.

"s/s David Randall Cordle

He then made and signed the following statement:

"December 27, 1971 8:20 p.m.

"Statement of David Randall Cordle W/M age 24, 406 Bridge St., Wetumpka, Alabama, as given to Det. H. W. Gandy of the Montgomery Police Dept. in regards to entering the residence at #20 Turner Place on about 11-25-71 at about midnight, taking a girl from this apartment against her will and taking her in an automobile and carrying her out the Wares Ferry Road near Montgomery East and raping her in the backseat of the car.

"My rights have been explained to me in this case and I understand that I do not have to give this statement unless I wish to do so.

"On this date, I had gotten off work at the Perkins Warehouse and Gin in Wetumpka, Alabama. I think it was around 8 o'clock that night that I got off, we had worked late that day. I did not go home, I come to Montgomery. I had stopped at the little Lounge on Coliseum Blvd. and had drank some beer. I then went to a movie at the Charles downtown. It was pretty late when I got out of the movie. I drove back out the Atlanta Highway, and when I got to Turner Place, I drove through. I thought about the girl at #20 that I had tried back in the summer and I decided to check on her. I looked for the family car and it was not there, so I parked my car near the telephone booth near the service station, and then I walked in behind the apartments. The light was on in #20, but I could not see anyone inside. I checked the back door and it was not locked. I opened it and walked inside. Just as I got in the kitchen, I saw a rocking chair in the living room move and I know someone was in the chair. I stood still for a little

while and then I slipped on over to the chair. I reached around and put my hand over the girl's mouth and at the same time told her not to scream or I would kill her or something to that effect. She had on glasses and I took them and put them on a table and at that time a dog in the apartment started to barking and I got scared and I told her to walk out the backdoor. I still had my hand over her mouth during this time. I had a little box cutter and I told her that I would cut her throat if she made a sound, but if she did what I said, I would not hurt her. We went to my car which was by the phone booth and I told her to get in and lay down or hold her head down. We left there and I drove out the Wares Ferry Road out past where they are building houses in Montgomery East. Just as I passed Montgomery East, there was a little dirt road to the left, I turned on it and went down there and parked. I told this girl to pull off her clothes and get in the back seat. She tried to get me not to do anything to her but I had built up a head of steam and I could not help myself. She got in the back seat and I then got back there with her. I had sex relations with her and then I

told her to put her clothes on and I would take her home. She then put her clothes on and I drove her back to Turner Place and let her out of the car. I then went home".

"Q. What type of car did you have at this time?

"A. A 1969 Lemans.

"Q. Does it have bucket seats?

"A. Yes.

"Q. What color is the seats?

"A. They are dark green.

"Q. What did you have on that night?

"A. I just don't remember.

"Witness s/s H. W. Gandy
H. W. Gandy 121

"Signed s/s David Randall Cordle
David Randall Cordle"

There had been a series of rapes and burglaries in Montgomery during the Summer and Fall of 1971. The police officers questioned Appellant about each of these crimes; however before interrogating him about each case, they gave him the Miranda warnings and he executed a waiver of rights form for each separate case as

that case was mentioned. This procedure was strictly followed in each separate case until Appellant had been questioned in seven or eight cases. Finally at 8:20 p.m. the officers mentioned the present case and the same procedure was carried out resulting in Appellant's voluntary confession.

Appellant predicates error on the part of the trial court in admitting into evidence his oral and signed confession claiming that he was subjected to long and protracted "custodial interrogation" without the Miranda warnings over a period in excess of four hours. This claim is not supported by the record in this case. As above pointed out, Appellant was a prime suspect in seven or eight cases of rape and burglaries. As the officers brought up each case they gave Appellant the Miranda warnings before interrogating him on each separate case. It was only after he indicated his willingness to talk and after expressly waiving his right to counsel did the officers ask him any questions.

The grand jury indicted Appellant on two charges of rape, three cases of burglary in the second degree, and two cases of assault with intent to ravish. No doubt these seven cases, and probably other, were discussed with Appellant during the four hour period leading up to his confession in the present case.

During this period of interrogation he was given food and a drink of his choice. Appellant complains that since the State did not offer in evidence the waiver of rights form on any other case, this tends to prove that he was interrogated for four hours before a confession was extracted from him in the instant case and, therefore, the confession was involuntary. Had the State offered such proof this would have been evidence showing separate and distinct crimes in one prosecution and would have constituted reversible error unless such criminal acts were relevant to the crime charged as bearing on scienter, intent, motive, res gestae, or the identity of the accused. Lambert v. State, 48 Ala.App. 600, 266 So.2d 812; "The Law of Evidence in Alabama" by Judge J. Russell McElroy, Vol. 1, 2d. Ed. pp. 166-169; 6 Ala. Digest Criminal Law Key No. 365.

The procedure followed by the police officers in this case fully complied with Miranda v. Arizona, supra.

Appellant insist the trial court committed reversible error in not affording him a full transcription of the proceedings at his preliminary hearing. Before the preliminary hearing he moved the magistrate for the appointment of a court reporter to record the testimony. This motion was denied. He renewed this motion in the Circuit Court seeking a second preliminary hearing. This motion, too, was denied.

A preliminary hearing is a critical stage in the criminal process in Alabama and at such a hearing the appointment of counsel is required for indigent defendants. Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387.

For well over a hundred years the preliminary hearing procedure in this state required the magistrate, or someone under his direction to reduce to writing the testimony of the witnesses both for the defendant and the State and to have the witnesses sign their names to their respective statements. Title 15, Section 135, Code of Alabama 1940. The Legislature saw fit to repeal this section by Act No. 1106, General Acts of Alabama 1969, approved September 12, 1969. There is no other statute requiring the recording and transcription of the testimony had and taken at a preliminary hearing in Alabama. Williams v. Jasper, 287 Ala. 237, 250 So.2d 701.

No error was committed by the trial court in overruling and denying Appellant's request for a second preliminary hearing and the appointment of a court reporter to record and transcribe the proceedings.

Appellant did not testify in his behalf but was contented to offer character witnesses and the testimony of a psychiatrist. The psychiatrist saw and examined Appellant in the Montgomery County jail

on two occasions, viz., March 7 and May 9, 1972. The psychiatrist was with Appellant about an hour on each occasion. His diagnosis was "schizophrenia with paranoid tendencies."

The doctor further testified that in his opinion Appellant did not have the mental ability to distinguish between right and wrong on the night he committed the rape and that he did not have the ability to distinguish between right and wrong on the two occasions he examined him in the county jail. The doctor said Appellant did not have a criminal intent at the time he took the girl on November 24 or 25, 1971.

The doctor further testified that the origin of Appellant's onset of mental illness dates from an episode in his life when he was fourteen years of age. The doctor described the incident as follows:

> "That goes away back to his childhood, and I'll try to find evidence here and read it to you as I received it from the patient...I have a lot here, but it all amounted to the fact that when he was about 14 years old, he was lying in his bedroom and he looked across the way to another building, and he saw a woman undress before the window and dance and carry on. He was sort of surprised by

this, and so he went out and got a closer look. He went close to the window, which was open, and the woman saw him and told him to come in the room, and she began to undress him and made him lie on the bed next to her, and made him finally submit to relations; and after he had done that, she left, presumably to go to the toilet, and he hurried out of there as fast as he could. From that time on, he had a compelling desire to see women undress, and when they undressed, it aroused such a sexual fervor, that he masturbated at the same time. This impulse would only seize him at certain times. Other times, he would be perfectly normal. But when the impulse came, he had no control over it whatsoever, and he submitted to his own impulses. That, I think, was the origin of the whole business."

The defense of insanity has been ruled on by the Appellate Courts of this State in many cases and on numerous occasions. From Wingard v. State, 247 Ala. 488, 25 So.2d 170, we take the following:

"The defense of insanity must be clearly proven to the reasonable satisfaction of the jury and the

burden is on the defendant to do so. Code 1940, Title 15, Sec. 422; Boyle v. State, 229 Ala. 212, 154 So. 575; Lee v. State, 246 Ala. 343, 20 So.2d 471; Reedy v. State, 246 Ala. 363, 20 So.2d 528.

"There is no sanction in our law of emotional insanity as an excuse for crime. Coffey v. State, 244 Ala. 514, 14 So.2d 122; Reedy v. State, supra.

"We repeat the well-known rule that to sustain the defense of insanity the evidence must establish that at the time of the commission of the crime the defendant was afflicted with a diseased mind to the extent that (1) he did not know right from wrong as applied to the particular act in question, or (2) if he did have such knowledge, he, nevertheless, by reason of duress of such mental disease had so far lost the power to select the right and to avoid doing the act in question as that his free agency was at the time destroyed, and (3) that, at the same time, the crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it solely. Parsons v. State, 81 Ala. 577, at pages

596, 597, 2 So. 854, to Am.Rep. 193."

The oral charge of the court thoroughly covered the law of insanity in criminal prosecutions and there was no error in refusing the written charge on this subject. Title 7, Section 273, Code of Alabama 1940.

There was no error in the rulings of the trial judge with reference to the unsworn medical report from the doctors at Bryce Hospital. In 31 A C.J.S., page 568, Section 200, Evidence, this rule is stated to be that "a witness cannot testify to facts of which his knowledge is derived from the unsworn statements of others,***."

We have carefully searched the record for errors injuriously affecting the substantial rights of Appellant and have found none. The case is due to be affirmed and it is so ordered.

AFFIRMED.

All the Judges concur.

April 9, 1974

STATE OF ALABAMA - JUDICIAL DEPARTMENT
COURT OF CRIMINAL APPEALS

3rd Div. 238

David R. Cordle

v.

State of Alabama

Appeal from Montgomery Circuit Court

Come the parties by attorneys, and the record and matters therein assigned for errors, being agrued and submitted and duly examined and understood by the Court; it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the Appellant pay the costs of appeal of this Court and of the Circuit Court.

May 21, 1974

STATE OF ALABAMA - JUDICIAL DEPARTMENT

COURT OF CRIMINAL APPEALS

3rd Div. 238

David R. Cordle

v.

State of Alabama

Appeal from Montgomery Circuit Court

IT IS ORDERED that the application for rehearing be and the same is hereby overruled.

STATE OF ALABAMA

MONTGOMERY COUNTY

I, Mollie Jordan, Clerk of the Court of Criminal Appeals, do hereby certify that the foregoing pages numbered 1 through 13 contain a full, true and correct copy of the opinion, judgment, and order overruling the application for rehearing in the appeal of David R. Cordle v. State of Alabama, Montgomery Circuit Court No. 7021, Court of Criminal Appeals 3rd Div. 238, as the same appear and remain of record and on file in this office.

Witness my hand, Mollie Jordan, Clerk of the Court of Criminal Appeals of Alabama, this the 25th day of September, 1974.

/s/ Mollie Jordan
Clerk of the Court of Criminal Appeals of Alabama

THURSDAY, JUNE 20, 1974

THE STATE OF ALABAMA - JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1973-74

SC 855
Ex Parte: David Randle Cordle
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: David Randle Cordle v. State)

Comes the petitioner and files in this Court his Petition for Writ of Certiorari to the Court of Criminal Appeals and the same being submitted and duly examined and understood by the Court, it is CONSIDERED AND ORDERED that the petition be, and the same is hereby, denied and the petition be, and the same is hereby, dismissed.
(No Costs Taxed)

THURSDAY, AUGUST 1, 1974

SC 855

Ex Parte: David Randle Cordle
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: David Randle Cordle vs. State of Alabama)

IT IS ORDERED that the application for rehearing filed in this cause on July 8, 1974, be, and the same is hereby, overruled.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 25th day of Sept., 1974.

/s/ J. O. Sentell
Clerk, Supreme Court of Alabama